80-6169

RECEIVED
FEB 9 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

No.

WILLIS F. STREATER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

JURISDICTIONAL STATEMENT FOR APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

RICHARD L. FIELDS

ROBERT A. FIELDS

5301 Wisconsin Ave., N.W.
Washington, D.C. 20015
(202) 363-1782

Counsel for Appellant

February 9, 1981

IN THE
SUPREME COURT OF THE UNITED STATES

No.

WILLIS F. STREATER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

JURISDICTIONAL STATEMENT FOR APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

QUESTIONS PRESENTED

1. Whether the indigent defendant's constitutional right to counsel was denied when the District of Columbia Court of Appeals allowed court appointed counsel to withdraw without consent or knowledge of defendant.

2. Whether the review of the Court of Appeals of the District of Columbia of the transcript of a criminal trial is a permissible substitute for the accused's right to counsel.

3. Whether the District of Columbia can deny all review of the effectiveness of appellate counsel through this case holding that the local equivalent of and exclusive substitute for Habeas Corpus is not available to review alleged consititutional violations at the appellate level.

THE OPINION BELOW

On November 10, 1981, the District of Columbia Court of Appeals issued a Memorandum Opinion and Judgment denying the Appellant the relief sought. See Appendix. This opinion has subsequently been ordered for publication, but has not yet appeared.

JURISDICTIONAL GROUNDS

The case below was an appeal from the denial by the Superior Court of the District of Columbia of Appellant's motion under D.C.Code §23-110, which is the equivalent of and substitute for Habeas Corpus in the jurisdiction. Swain v. Pressley, 430 U.S. 372, 51 L. Ed 2d 411, 97 S. Ct. 1224, (1977). The District of Columbia Court of Appeals held that §23-110 "provides no basis upon which the trial court may review appellate proceedings." (p. 2) Consequently, taken

in conjunction with this Court's holding in Swain v. Pressley, supra, there appears to be no review of a denial of constitutional rights at appeal in the District of Columbia save through direct appeal to this Court.

Jurisdiction of this Court is founded on 28 U.S.C. §1257(2). The decision below establishes that the District of Columbia Statute allows no review of appellate process, and that such failure to review constitutional issues such as denial of right to counsel is unconstitutional. The statute is therefore repugnant to the Sixth Amendment to the Constitution as applied to the states through the Fourteenth Amendment.

THE STATUTE

The statute with which we are here concerned is set out in footnote 1 to the Opinion below, included in the appendix.

STATEMENT OF THE CASE

Willis Streater was convicted on July 29, 1976 of robbery, D.C. Code 1973, §22-2901. Appellant's trial counsel was appointed under the Criminal Justice Act to appeal the conviction. On November 14, 1977, that counsel moved to withdraw from the case, and that motion was granted by the District of Columbia Court of Appeals on August 15, 1978, over two years after the conviction. At that time the Court of Appeals also affirmed the conviction, effectively ending the appellant's proceedings before that Court. When the Appellant learned of the action of the Court of Appeals he no longer had any rights to proceed with his appeal under applicable law. This we do not question.

However, the Appellant did move the lower court to set aside his sentence solely for the purpose of allowing him time to appeal the merits of his original conviction. This motion was filed pro se. Counsel was later appointed. The motion to vacate the sentence was denied on August 8, 1979. The judge in the lower court found that there was effective assistance of counsel at appeal, (Opinion at p. 2) but when that decision was appealed, the Court of Appeals held that there had never been a right to make the motion. It is that decision that we are challenging here. The question of constitutional right to counsel was argued by both sides. However, the Court of Appeals now holds that there is no method whereby the issue of ineffective appellate counsel can be raised.

SIGNIFICANCE OF QUESTIONS PRESENTED

The United States of America notes in its Motion for Publication, included in the appendix, that this case is the only reported consideration of trial court review of appelate proceedings. The only cases cited by the Appellee involve federal Habeas Corpus. The significance of this case is that it arises in a jurisdiction with no intermediate appellate court, and with no right to federal court review of unconstitutional treatment of indigent criminal defendants.

This Court would be the only source of review of the appellate procedure followed under Anders v. California, 386 U.S. 738, 18 L. Ed 2d 493, 97 S.Ct 1396, (1967). Here we find that there is no state Habeas Corpus proceeding as followed in Anders, and no Federal right under Swain v. Pressley, supra.

The only forum to challenge the procedure is therefore the Supreme Court of the United States. Failure to consider this case leaves open the unresolved issue of the constitutional rights of the accused in the District of Columbia. The arguments below as to both equal protection and right to counsel have not been considered according to the opinion below. It is the position of the Appellant that Due Process under the Fourteenth Amendment requires that there be some process available to test the constitutionality of state action.

We therefore urge that this is a case that requires briefs on the merits and oral arguments, considering not only the rights of accused persons in the District of Columbia but as a guide to what consitiutes the limit of state power throughout the country.

APPENDICES

Appendix 1

District of Columbia Court of Appeals

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED NOV 10 1980

Hugh E. Kline
Acting Clerk

No. 79-899

WILLIS F. STREATER,
Appellant,

v. No. 54462-72

UNITED STATES,
Appellee.

Appeal from the Superior Court of the
District of Columbia,
Criminal Division

(Hon. Norma Holloway Johnson, Trial Judge)

(Submitted October 8, 1980 Decided November 10, 1980)

Before: Kelly, Kern and Harris, Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

On July 29, 1976, appellant Willis F. Streater was convicted at a jury trial of one count of robbery, D.C. Code 1973, § 22-2901, and acquitted of two counts of armed robbery, D.C. Code 1973, §§ 22-2901, -3202, and assault with a dangerous weapon, D.C. Code 1973, § 22-502. Appellant's retained trial counsel, Charles F. Stow III, was appointed as his representative on appeal by this court. On November 14, 1977, Mr. Stow filed a motion to withdraw from the appeal certifying that there were no non-frivolous issues for appeal. We entered an order on August 15, 1978, granting the motion to withdraw and affirming appellant's conviction.

Four months later, on December 27, 1978, appellant filed, pro se, a motion in the District of Columbia Superior Court to vacate his sentence pursuant to D.C. Code 1973, § 23-110. 1/ The Superior Court granted appellant's request for court-appointed counsel and appointed Martin J. Callaghan. On April 20, 1979, Mr. Callaghan filed a supplemental motion to vacate sentence pursuant to D.C. Code 1973, § 23-110. An evidentiary

---

1/ Section 23-110 provides, in pertinent part:

> (a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

hearing on the motion was held on May 24, 1979. Superior Court Judge Norma Holloway Johnson issued an opinion and order on August 8, 1979, denying appellant's motion to vacate sentence. Judge Johnson found that "the Court of Appeals was able to provide full consideration and resolution of the issues as there was indeed an advocate," using the Anders v. California, 386 U.S. 738 (1967) test. 2/ Appellant now appeals that finding.

We hold that the grounds for the relief requested by appellant are not within the purview of § 23-110. (See note 1 supra.) Appellant has not argued that his sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia. Nor has the appellant argued that the Superior Court was without jurisdiction to impose the sentence, or that the sentence is in excess of the maximum authorized by law. And, finally, appellant has not argued that his sentence is otherwise subject to collateral attack.

Appellant has raised, as grounds for vacating his sentence, Mr. Stow's alleged ineffectiveness of counsel in prosecuting the appeal. Section 23-110 provides no basis upon which the trial court may review appellate proceedings. Accordingly, it is

ORDERED and ADJUDGED that the judgment appealed from is affirmed.

PER CURIAM.

For the Court:

Hugh E. Kline,
Acting Clerk.

---

[2] In Anders v. California, supra, the Supreme Court set forth the procedures to be followed when a court-appointed counsel seeks to withdraw from a criminal appeal.

Copies to:

Honorable Norma Holloway Johnson

Clerk, Superior Court

Richard F. Fields, Esquire
5301 Wisconsin Avenue, N.W.,
Suite 103
Washington, D.C. 20015

John A. Terry, Esquire
Assistant U. S. Attorney

Appendix 2

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 79-899
(Cr. No. 54462-72)

WILLIS F. STREATER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MOTION FOR PUBLICATION OF MEMORANDUM OPINION

Appellee respectfully moves, pursuant to section IX (B) of the Internal Operating Procedures of this Court, that the memorandum opinion issued by the Court on November 10, 1980, be published and sent to the West Publishing Company for inclusion in the Atlantic Reporter.

We ask for publication because the Court's opinion seems to be the only holding of this Court to the effect that 23 D.C. Code § 110 "provides no basis upon which the trial court may review [prior] appellate proceedings" (Memorandum Opinion at 2). We recall that in writing our brief we had difficulty in finding applicable case law,[1/] and we submit that publication of the Court's opinion would provide the bench and bar of the District of Columbia with a very useful precedent -- perhaps the only available precedent -- on this particular issue.

1/ We were able to find only two cases arising under 28 U.S.C. §2255, one from the Third Circuit and one from the Fifth Circuit. While they were quite helpful, a case from the District of Columbia arising under section 110 would have been even more helpful.

WHEREFORE, it is respectfully requested that the instant motion be granted.

CHARLES F. C. RUFF
United States Attorney

JOHN A. TERRY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been mailed to counsel for appellant, Richard L. Fields, Esquire, 5301 Wisconsin Avenue, N.W., Washington, D.C., 20015, on this 5th day of December, 1980.

JOHN A. TERRY
Assistant United States Attorney

DISTRICT OF COLUMBIA
COURT OF APPEALS

REC'D FEB 9 1981

Hugh E. Kline
Acting Clerk

DISTRICT OF COLUMBIA COURT OF APPEALS

WILLIS F. STREATER

Appellant

v.

No. 79-899

UNITED STATES OF AMERICA

Appellee

NOTICE OF APPEAL

Notice is hereby given that Willis F. Streater hereby appeals to the United States Supreme Court from the decision of this court entered in the above captioned case on the 10th day of November, 1980.

Richard L. Fields
Counsel for Appellant
5301 Wisconsin Ave., N.W.
Washington, D.C. 20015
(202) 363-1782 UBN 958926

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellant's Notice of Appeal to the United States Supreme Court has been served by mail upon the Office of the Solicitor General, Department of Justice, Washington D.C. 20530, this 9th day of February, 1981.

Richard L. Fields

80-6169

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
FEB 9 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIS F. STREATER Appellant	:	
v.	:	No.
UNITED STATES OF AMERICA Appellee	:	

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Comes now the Appellant, Willis F. Streater, and prays this honorable Court for leave to proceed on appeal without being required to prepay fees, costs or give security therefor, due to my poverty. As grounds I state the following:

1. The appeal to the court below, the District of Columbia Court of Appeals was conducted in forma pauperis, under the Criminal Justice Act, all provisions of that act having been complied with.

2. The Appellant is currently incarcerated and has no realistic possibility of acquiring funds with which to proceed.

3. The Affidavit in Support of this Motion will be executed in compliance with the rules of this court.

Respectfully submitted,

Richard L. Fields
Counsel for Appellant

Robert A. Fields
Counsel for Appellant

No. 80-6169

RECEIVED
MAR 18 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

WILLIS F. STREATER, PETITIONER

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MOTION BY THE UNITED STATES TO DISMISS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6169

WILLIS F. STREATER, PETITIONER

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MOTION FOR THE UNITED STATES TO DISMISS

Appellant claims that he was denied effective assistance of counsel on appeal when the appellate court permitted his attorney to withdraw and affirmed his conviction based on its review of the record.

After a jury trial in the Superior Court of the District of Columbia, appellant was convicted of robbery, in violation of D.C. Code §22-2901. He was sentenced to a term of 5 to 15 years' imprisonment. The District of Columbia Court of Appeals affirmed. Appellant then filed a motion in the Superior Court to vacate his sentence pursuant to D.C. Code §23-110, the District of Columbia analogue of 28 U.S.C. 2255. That motion was denied and the court of appeals affirmed (J.S. App. 1-2).

1. Appellant's trial counsel was appointed under the Criminal Justice Act to represent him on appeal. Subsequently, counsel filed a formal motion to withdraw in which he represented that no non-frivolous issue was presented by the appeal. That motion, five pages in length, summarized the evidence, set out various legal considerations, and expressed counsel's legal conclusions. In the motion counsel stated that he had consulted with appellant on several occasions regarding his inability to find any non-frivolous issues and had also discussed the matter with counsel for appellant's co-defendant.[1/] Nine months after the motion to withdraw was filed, the court of appeals also concluded -- after reviewing the motion, the record on appeal, and the trial transcript -- that no non-frivolous issue was presented. Accordingly, it granted counsel's motion to withdraw and affirmed appellant's conviction.

Appellant thereafter filed a motion to vacate his sentence pursuant to D.C. Code §23-110, asserting that his counsel's motion to withdraw on appeal failed to meet the standards of effective representation set forth in Anders v. California, 386 U.S. 738 (1967). In a written opinion, a copy of which is appended hereto, the Superior Court denied the motion, finding that the Anders standards were fully met (App., infra, 1-4). On appeal from that denial, the court of appeals did not consider the Anders question, but instead affirmed the judgment on the ground that appellant's claim is not cognizable under D.C. Code §23-110 because that statute provides no basis for trial court review of appellate proceedings (J.S. App. 2).

1/ The co-defendant's counsel concurred in the evaluation that the appeal did not present any non-frivolous issues.

2. Appellant erroneously asserts (J.S. 2) that jurisdiction for this appeal rests on 28 U.S.C.. 1257(2). Section 1257 sets forth the procedures for review by this Court of final judgments or decrees rendered by the "highest court of a State" and provides that that term shall include the District of Columbia Court of Appeals. Subsection 2 provides that review shall be by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." It is not clear from the Jurisdictional Statement whether appellant seeks review of his underlying claim of ineffective assistance of counsel on appeal or limits his challenge to the appellate court's judgment that the claim is not cognizable under D.C. Code §23-110. If the former, quite plainly the only avenue for review is a writ of certiorari under 28 U.S.C. 1257(3). In any event, even if the constitutionality of the District of Columbia's post-conviction relief statute was drawn in question in the lower court, D.C. Code §23-110 is simply not a "state statute" such that a decision upholding it against a federal challenge gives rise to a direct appeal. Palmore v. United States, 411 U.S. 389, 394-396 (1973).

3. Nor is there a basis for certiorari review in this case. The court of appeals correctly held that appellant's claim is not cognizable under D.C. Code §23-110. That statute provides, as does 28 U.S.C. 2255 in substantially identical terms, for a collateral attack on asserted infirmities in the imposition of sentence. All circuits to have considered the

issue have held that the federal statute does not authorize collateral attack at the trial court level upon alleged errors in appellate proceedings. Powers v. United States, 316 F.2d 223, 224 (10th Cir.), cert. denied, 375 U.S. 858 (1963); Williams v. United States, 307 F.2d 366, 368 (9th Cir. 1962); Rivera v. United States, 477 F.2d 927, 928 (3d Cir. 1973); Berube v. United States, 355 F.2d 543, 544 (5th Cir. 1966); see also Quinn v. United States, 500 F.2d 387 (5th Cir. 1974). The remedy, when such an infirmity is asserted, is a motion to the appellate court to recall its mandate and reinstate the appeal. Williams v. United States, supra; Rivera v. United States, supra; see also Quinn v. United States, supra. The same rule logically applies to the cognate District of Columbia statute.[2/] Under both statutory schemes, the proper remedy avoids the incongruity of asking an inferior court to sit in judgment on proceedings in an appellate court. Rivera v. United States, supra.[3/]

2/ Since a remedy was available to appellant, there is no merit to his assertion (J.S. 2) that the court of appeals effectively held "that there is no method whereby the issue of ineffective appellate counsel can be raised."

3/ Although we do not believe that the Superior Court had jurisdiction to consider the issue, we agree with its reasoning (App., infra, 2-4) that the steps taken by both the withdrawing counsel and the court of appeals satisfied the constitutional requirements enunciated in Anders v. California, supra, 386 U.S. at 744-745.

It is therefore respectfully submitted that the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, it is respectfully submitted that the petition should be denied.

WADE H. McCREE, JR.
Solicitor General

MARCH 1981

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

FILED

UNITED STATES OF AMERICA :

v. : Criminal No.

WILLIS F. STREATER :

OPINION AND ORDER

Willis F. Streater, defendant herein, contending that he was denied effective assistance of counsel in prosecuting the appeal of his case before the District of Columbia Court of Appeals, moves to vacate the sentence imposed and to be re-sentenced pursuant to District of Columbia Code 1973 §23-110.

On December 27, 1978, defendant filed a pro se motion, together with points and authorities and an affidavit, for post-conviction relief. His request for court-appointed counsel was granted and counsel filed a supplemental motion to vacate sentence on April 20, 1979.

An opposition was filed by the Government on February 23, 1979. Thereafter, a hearing was held on the motion on May 24, 1979.

It is the position of defendant that he was denied effective assistance of counsel in that appellate counsel failed to file either an appeal brief in his behalf or to file a brief meeting the minimum standards set forth in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Defendant argues that although appellate counsel filed a motion to withdraw purporting to follow the criteria outlined in Anders, supra, such motion was deficient in that it failed to set out the points which defendant sought to assert and to cite cases bearing on these issues. The motion, defendant asserts, is no more than the "no-merit letter" proscribed by Anders. Further, defendant maintains that he was not accorded adequate time to file a pro se brief nor was he kept advised by appellate counsel of the progress of the case in the Court of Appeals.

The Government not only opposed the motion but also urged that the petition be denied without a hearing. The position of the Government is that this case is clearly distinguishable from Anders and that the records conclusively reflect that appellate counsel fully and professionally discharged his duty to his client and that his representation was constitutionally effective.

A brief history of the case appears warranted. Defendant was indicted in June 1976 on charges of armed robbery, robbery, and assault with a dangerous weapon. On July 29, 1976, a jury returned a verdict of guilty on the robbery count and verdicts of not guilty on the other counts. Defendant was sentenced to a period of imprisonment of not less than five nor more than fifteen years on November 2, 1976. A notice of appeal was timely filed on November 11, 1976, by trial counsel who had been retained. Trial counsel was thereafter appointed as appellate counsel under the Criminal Justice Act.

On November 14, 1977, appellate counsel filed a formal motion to withdraw representing to the court that, in his opinion, no nonfrivolous issue was presented. Thereafter, the Court of Appeals issued the following judgment on August 15, 1978:

> This cause came on for consideration on the motion of counsel to withdraw and the Court, having reviewed the motion and the record on appeal containing the reporter's transcript of the proceedings in the trial court and being of the view this case presented no nonfrivolous issue, it is
>
> ORDERED that the motion be granted, and it is
>
> FURTHER ORDERED and ADJUDGED that the judgment of conviction on appeal is affirmed.

Defendant's reliance on Anders, supra, is misplaced. Counsel filed a formal motion setting out, among other things, a statement of facts, his legal consideration accorded the issues, and a legal conclusion. Moreover, counsel was not limited to just the cold record - he had not only served as trial counsel but also consulted with defendant and

counsel for the co-defendant.[1] Defendant maintains that the motion does not set out the points nor cites cases which he chose to assert. Anders does not hold that counsel must delineate defendant's list of alleged errors. Interestingly, at the hearing hereon defendant enumerated six arguable issues. In his pro se motion he mentioned two: (1) witness testimony did not corroborate and (2) court erred in admitting gun as evidence over objection. The defendant had been found not guilty on both counts relating to the weapon - hardly an arguable issue on appeal; counsel noted the appeal on sufficiency of the evidence - this could surely include defendant's theory of failure of corroboration of witness testimony. Should Anders require such, this Court finds the motion was not deficient.

The formal motion in this case cannot be compared with the letter in Anders. There, counsel made a bold assertion that there was no merit to the appeal and that he would not file a brief. Moreover, the appellate court there reviewed the record and affirmed the judgment but failed to note its assessment of the record. Here, counsel found the appeal to be wholly frivolous without an arguable issue after a conscientious review of the entire transcript and consultation with defendant. The Court finds that the motion to withdraw was active advocacy as opposed to an impartial evaluation. Appellate counsel's conduct and product far exceeded that of a friend of the court. It is also found that defendant received effective assistance in counsel's search for nonfrivolous issues.

Even more important to the resolution of this issue is the judgment of the Court of Appeals. In order to fulfill its responsibility on motions of counsel for leave to withdraw from representation of a defendant on appeal, the court must conclude, as it did here, that counsel

---

[1] Co-defendant Jacob Brooks also noted an appeal. Upon motion to withdraw by his appellate counsel, said motion was granted and the appeal dismissed on September 1, 1977, as there were no nonfrivolous issues presented.

has made a conscientious investigation of the case and agree with counsel's evaluation of the appeal that it contains no nonfrivolous issues. Defendant does not specifically assert that the court failed in its responsibilities but does assert that the deficiency of the motion to withdraw impacts upon its final judgment. Having found that the formal motion does meet constitutional muster, the Court concludes that the Court of Appeals was able to provide full consideration and resolution of the issues as there was indeed an advocate.

For the foregoing reasons, which constitute the Court's findings of fact and conclusions of law, the motion of defendant to vacate sentence pursuant to 23 D.C. Code 110 must be denied.

WHEREFORE, it is this 6th day of August, 1979,

ORDERED that the motion of defendant to vacate sentence be and hereby is, DENIED.

NORMA HOLLOWAY JOHNSON
Judge

Copies to:

Martin J. Callaghan, Esq.

Mark J. Biros
Assistant United States Attorney

Charles F. Stow, III, Esq.